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U.S. BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:)	
)	Case No. BK-S-04-19784-BAM
RISING SUN PROPERTIES, L.L.C.,)	Chapter 11
)	
Debtor.)	Hearing Date: April 6, 2005
)	Hearing Time: 9:30 a.m.
)	

**OPPOSITION TO DEBTOR'S MOTION TO EXTEND BANKRUPTCY STAY
AFFORDED DEBTOR TO CODEBTOR**

Secured Creditor Sun West Bank (the "Bank") hereby submits its opposition to the Motion to Extend Bankruptcy Stay Afforded Debtor to Codebtor (the "Motion") filed by Debtor RisingSun Properties, L.L.C. ("Debtor" or "RisingSun")

FACTUAL BACKGROUND

Sun West Bank is a secured creditor of RisingSun, and a related entity, Island Dreams, L.L.C. ("Island Dreams") Both RisingSun and Island Dreams have filed for Chapter 11 Bankruptcy. (Island Dreams case number: 04-19584.)

As this Court may be aware, based on payment default of RisingSun and Island Dreams under two sets of loan documents in favor of the Bank, the Bank filed suit against Island

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1 Dreams, RisingSun, and Mr. Leslie I. Fujimoto ("Mr. Fujimoto") in State District Court (Case No.
2 A485610) (the "State Court Action") on May 14, 2004. The Bank's Amended Complaint in the
3 State Court Action sought judgment in its favor against Island Dreams on its obligations pursuant
4 to the Bank's rights and remedies with respect to a payment default, as set forth in the loan
5 documents evidencing an obligation in the original principal amount of \$680,000 (the "Island
6 Dreams Loan"). The Bank's Amended Complaint sought appointment of a receiver in connection
7 with the loan documents evidencing RisingSun's obligation in the original principal amount of
8 \$1,920,000 (the "RisingSun Loan"), pursuant to the Banks' rights and remedies upon a payment
9 default of RisingSun. Moreover, the Bank's Amended Complaint seeks judgment against Mr.
10 Fujimoto, pursuant to two independent guaranties he executed in connection with the Island Dreams
11 Loan and the RisingSun Loan, respectively. (A copy of the Bank's Amended Complaint in the State
12 Court Action is attached hereto as Exhibit A.) The Court is referred to the "general allegations" of
13 the Bank's Amended Complaint for a complete factual background of the Island Dreams Loan and
14 the RisingSun Loan, including Mr. Fujimoto's independent obligations to the Bank, and the payment
15 default of Island Dreams, RisingSun and Mr. Fujimoto.
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19 Upon the filing of the instant Chapter 11 Bankruptcy matter, and the Island Dreams
20 Chapter 11 Bankruptcy matter, the State Court Action was stayed with respect to the Bank's action
21 against Island Dreams and RisingSun. However, it has been and still is the Bank's position that the
22 State Court Action has not been stayed with respect to Mr. Fujimoto, as there is no basis to stay the
23 action due to his independent, separate, and distinct obligations to the Bank.
24

25 LEGAL ARGUMENT

26 Contrary to Debtor's argument, section 362 of the Bankruptcy Code should not and
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1 cannot operate to extend the automatic stay in favor of Mr. Fujimoto. Mr. Fujimoto is not a debtor,
2 and there is no applicable provision that provides him with automatic stay protection.

3
4 The automatic stay of Section 362 of the [Bankruptcy] Code¹ stays judicial
5 proceedings against the debtor or property of the debtor's estate, but not against any other entity or
6 an other entity's assets. In contrast to Chapter 13, there is no provision in Chapter 11 for applying
7 the stay to co-debtors." *In re Rohnert Park Auto Parts, Inc.*, 113 B.R. 610, 614 (B.A.P. 9th Cir.
8 1990) (emphasis added). Moreover, it is clear that had Congress intended to extend the stay in
9 Chapter 11 matters to codebtors, they could have done just that:
10

11 Congress knew how to extend the automatic stay to
12 nonbankrupt parties when it intended to do so.
13 Chapter 13, for example, contains a narrowly drawn
14 provision to stay proceedings against a limited
15 category of individual cosigners of consumer debts
16 No such protection is provided to the guarantors of
17 Chapter 11 bankrupts by § 362(a).

18 Id., quoting *Credit Alliance v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988) (emphasis added) (internal
19 quotations omitted). Accordingly, it is clear that Congress never intended for the automatic stay to
20 extend to guarantors of obligations of Chapter 11 debtors, such as the case here.

21 The automatic stay provisions of the Bankruptcy Code do not operate to extend the
22 protections of such automatic stay to Mr. Fujimoto or his property. *Advanced Ribbons and Office*
23 *Products, Inc. v. U.S. Interstate Distributing, Inc.*, 125 B.R. 259 (B.A.P. 9th Cir. 1991) ("The
24 automatic stay of section 362(a) protects **only** the debtor, property of the debtor or property of the
25 estate.")(emphasis added); *United States v. Dos Cabeza Corp.*, 995 F.2d 1486 (9th Cir. 1993); and
26 *In re Torrez*, 132 B.R. 924 (Bkrtcy E.D. Cal. 1991). In fact, this Circuit has specifically found that

27 ¹11 U.S.C. § 362

1 section 362(a) of the Bankruptcy Code does not stay actions against guarantors, sureties, corporate
 2 affiliates, or other non-debtor parties liable on the debts of the debtor. *Ingersoll-Rand Financial*
 3 *Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1427 (9th Cir. 1987) (emphasis added).
 4

5 The limited situations where the automatic stay may be extended to a co-debtor would
 6 certainly not apply here. Moreover, the Bank is not seeking payment of the Island Dreams Loan and
 7 the RisingSun Loan from the assets of the bankruptcy estates of Island Dreams and RisingSun, but
 8 merely seek to have Mr. Fujimoto's unconditional and independent liability on the Island Dreams
 9 Loan and RisingSun Loan, respectively, reduced to judgment, pursuant to the undisputed provisions
 10 of the respective guaranties of Mr. Fujimoto.
 11

12 The position set forth by Debtor's counsel² (Motion, paragraph 11) has been explicitly
 13 rejected in this Circuit. *See In re Lockard*, 884 F.2d 1171, 1179 (9th Cir. 1989) (where the Court
 14 acknowledged the "unusual situation" exception as set forth in *A.H. Robins*, and declined to extend
 15 such a rule in the Ninth Circuit.) Moreover, even *A.H. Robins* limited its own exception "by
 16 excluding from the coverage of the automatic stay cased in which the third party (or codefendant)
 17 is "independently liable" to the creditor. *In re Lockard*, 884 F.2d at 1179 (emphasis added). *See*
 18 *also A.H. Robins*, 788 F.2d at 999.
 19

20 Here, it is abundantly clear that the automatic stay of 11 U.S.C. § 362 does not apply
 21 to the State Court Action against Mr. Fujimoto. *In re Lockard*, 884 F.2d 1171, 1179 (9th Cir. 1989),
 22 *Advanced Ribbons and Office Products, Inc. v. U.S. Interstate Distributing, Inc.*, 125 B.R. 259
 23 (B.A.P. 9th Cir. 1991), and *Ingersoll-Rand Financial Corp. v. Miller Mining Co.*, 817 F.2d 1424,
 24

25 _____
 26 ²
 27 Debtor's motion relies on *A.H. Robins v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876,
 107 S.Ct. 251 (1986).
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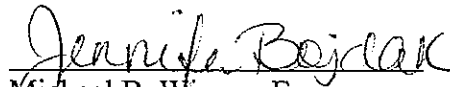
1 1427 (9th Cir. 1987). As mentioned, Mr. Fujimoto's obligations to the Bank are separate, distinct,
2 and independent of the obligations of Island Dreams and RisingSun. Accordingly, this Bankruptcy
3 Court should not extend the automatic stay to Mr. Fujimoto.
4

5 **CONCLUSION**

6 Based on the foregoing, Sun West Bank submits that this Court should deny Debtor's
7 Motion, and not extend the automatic stay provisions of Section 362 of the Bankruptcy Code to Mr.
8 Fujimoto.
9

10 DATED this 23 day of March, 2005.

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